85-598

No. 85-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

GRUMMAN OHIO CORPORATION,
GRUMMAN ALLIED INDUSTRIES, INC. and
GRUMMAN CORPORATION,

Petitioners,

v.

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the New York courts forcing Grumman to litigate before a New York court and jury a dispute with the New York City Transit Authority which is subject to arbitration under a federally-mandated disputes resolution clause, deprives Grumman of its rights under the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.?*

2. Whether the refusal of the New York courts to disjoin from claims alleged in the New York Transit Authority complaint which the New York courts concluded were not subject to arbitration, claims within the Disputes clause which are clearly subject to arbitration, conflicts with the decision of this Court in *Dean Witter Reynolds, Inc.* v. *A. Lamar Byrd*, 53 U.S.L.W. 4222 (U.S. Mar. 4, 1985)?

3. Whether the New York courts misconstrued the decision of this Court in *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), in attempting to apply, to a dispute between non-federal parties involving issues of fact within a federally-mandated disputes resolution clause, *Utah Construction's* distinction between claims remedial under a contract from breach of contract claims?

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.*

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*Pursuant to Rule 28.1 of this Court, petitioners state that the following list identifies all parent companies, subsidiaries and affiliates of each corporate petitioner:

Parent: Grumman Corporation

Subsidiaries: Grumman Ohio Corporation
Grumman Allied Industries, Inc.
Grumman Export Sales Corp.
Grumman Aerospace Corp.
Grumman Credit Corp.
Grumman Data Systems Corp.
(Division: ISC Systems, Inc.)
Grumman International, Inc.
Paumonock Development Corp.

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THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners, Grumman Ohio Corporation, Grumman Allied Industries, Inc. and Grumman Corporation (collectively "Grumman"), respectfully pray that a Writ of Certiorari issue to review the order entered in this proceeding by the Court of Appeals of the State of New York on July 9, 1985.

OPINIONS BELOW

The September 19, 1984 order of the New York Supreme Court, Special Term (1a-7a),[1] which converted Grumman's motion to dismiss the complaint into a motion to compel arbitration and denied such motion, is unreported.

1. Citations herein to material printed in the Appendix appear as "(__ a)."

The February 19, 1985 order of the Appellate Division, First Department (8a-11a), affirming the order of the Supreme Court, is unreported. The April 23, 1985 order of the Appellate Division (12a-14a), denying Grumman's motion for leave to appeal to the Court of Appeals, also is unreported.

The July 9, 1985 order of the Court of Appeals of the State of New York (15a-17a), denying Grumman's motion for leave to appeal, is unreported.

JURISDICTION

The order of the Court of Appeals of the State of New York was entered on July 9, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTES AND REGULATIONS INVOLVED

Section 2, Title 9, United States Code, reads as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The UMTA-mandated Disputes clause reads as follows:

> Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to UMTA a written appeal. The decision of UMTA's duly authorized representative for the determination of such appeals shall be

final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

This clause does not preclude consideration of law questions in connection with decisions provided for in this clause, provided that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

STATEMENT OF THE CASE

This case arises out of the refusal of the plaintiffs-respondents, the City of New York, New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority and Port Authority of New York and New Jersey (collectively referred to as the "City") to submit to arbitration any of the factual issues in dispute under a series of contracts between Grumman Ohio Corporation and the City (the "City contracts") for the purchase of 1,013 Model 870 advanced design transit buses from Grumman, as required by the disputes resolution clause in the City contracts, Part I, paragraph 2.17 (the "Disputes clause").[2] The City has instead sought to try its claims in local state courts which, in turn, have countenanced the City's efforts.

The Disputes clause of the City contracts provides, *inter alia*, that "any dispute concerning a question of fact arising under this contract ... shall be decided by the Contracting Officer...." The decision of the Contracting Officer may then be appealed in writing to the Urban Mass Transportation Administration ("UMTA"), whose decision on such appeal "shall be final and conclusive unless determined by a court of competent jurisdiction

2. The full text of the Disputes clause is set forth, *supra*, pp. 2-3.

to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence."

The City contracts were based on a "White Book" specification established by UMTA under the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. §§ 1601 *et seq.* *See* 42 Fed. Reg. 9,654 (1977); 42 Fed. Reg. 13,816 (1977). The "White Book," as well as the City contracts promulgated thereunder, contain detailed and extensive warranty procedures for remedying individual and fleet defects and reflect an understanding that such defects could occur during operation of the buses, which were of a new design. The "White Book" also mandated inclusion of the Disputes clause in all federally-subsidized bus contracts, including the City contracts. By mandating use of the Disputes clause in all such contracts, UMTA, which paid for approximately 80% of the purchase price of the buses, assured Grumman and other bus manufacturers participating in the federal program that any disputes under their contracts with local procuring authorities would be subject to uniform federal procedures and administrative adjudication rather than to adjudication by local courts and juries wherever their buses were sold. Nevertheless, the New York State courts have permitted the City to ignore the Disputes clause in its contracts.

The dispute which ultimately led to Grumman's invocation of the Disputes clause began on February 7, 1984, when the City abruptly and without good cause withdrew from revenue service all 851 Model 870 buses in the City's possession. Although the City's complaint is grounded on numerous legal theories, the core issue of fact central to all its claims, and which properly is subject to resolution under the Disputes clause, is whether any defects which may have existed in the buses at the time they were removed from service were remediable under the contractually-specified warranty procedures.

On May 9, 1984, after it had become clear that no agreement between the parties was possible, Grumman submitted this issue to the City's contracting officer, thereby initiating the first step in

the Disputes clause procedures. The City responded to Grumman's invocation of the arbitration proceedings of the Disputes clause by, one day later, initiating a lawsuit against Grumman in the Supreme Court of the State of New York, New York County. Grumman's attempt to pursue this administrative remedy, granted to it by federal law, has been thwarted by the refusal of the New York State courts to order the City to comply with its agreement to arbitrate.

The New York State Courts' Orders

Within the time allowed under New York procedure, Grumman moved the Supreme Court of the State of New York for an order dismissing the City's complaint or, in the alternative, staying the proceedings. The purpose of Grumman's motion to dismiss or stay was to prevent the City from circumventing the procedures for dispute resolution set forth in the Disputes clause.

On September 19, 1984, the New York Supreme Court entered an order converting Grumman's motion to dismiss the complaint or to stay the proceedings into a motion to compel arbitration, and denied said motion (1a-7a). The New York court ruled that the Disputes clause was inapplicable because the City's complaint included, *inter alia*, U.C.C., fraud and punitive damage claims which, in the opinion of the court, were not claims "the parties intended . . . to be submitted to a 'Contracting Officer' " (6a). The court also relied upon UMTA's expressed unwillingness to arbitrate the dispute (5a).[3]

3. Grumman has challenged UMTA's refusal to fulfill its obligations under the identical Disputes clause in similar litigation involving the Chicago Regional Transportation Authority ("RTA"). As discussed *infra*, RTA sued Grumman Ohio Corporation in the United States District Court for the Northern District of Illinois, alleging the same types of claims as are alleged in this action. Grumman filed the identical motion to dismiss, which was granted by District Judge Shadur. *Regional Transportation Authority* v. *Grumman Flxible Corp.*, 532 F. Supp. 665 (N.D. Ill. 1982) (the *"RTA litigation"*).

Following the federal court decision in the *RTA litigation*, UMTA, the designated arbitrator under the Disputes clause, affirmed a decision of an RTA contracting officer without according Grumman a *de novo* hearing on the merits of the dispute, as required by the Disputes clause. Grumman challenged UMTA's refusal to provide a *de novo* review in

As explained more fully below, the New York decision, which made no effort to disjoin the factual issues which were clearly subject to the Disputes clause, and which relied on the form rather than the substance of the NYCTA complaint's allegations, ignored the contrary rulings of the federal court in Chicago in the *RTA litigation* involving similar claims, the same bus procurement program and an identical contractual dispute resolution clause. The New York Court's decision also ignored the contrary rulings of several recent U.S. Supreme Court decisions emphasizing the strong federal policy in favor of arbitration and, in fact, was based entirely on an incorrect analysis of one case—*United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966)—an analysis which, as discussed below, was repudiated by the federal court in the *RTA litigation. See, infra,* Part II.

On September 24, 1984, Grumman served and filed a notice of appeal from the New York Supreme Court's order with the Appellate Division, First Department. The Appellate Division on February 19, 1985, issued an order affirming the order of the New York Supreme Court (8a-11a). Despite the importance of the federal questions presented, and the contrary rulings of the federal court in Chicago, the Appellate Division did not offer any rationale for its decision.

Grumman next sought leave from the Appellate Division to appeal to the New York Court of Appeals. This motion was denied on April 23, 1985, again without opinion (12a-14a).

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the United States District Court for the District of Columbia. The District Court for the District of Columbia denied Grumman's request for relief and Grumman appealed. *Grumman Ohio Corp.* v. *Dole, et al., appeal filed,* No. 84-5543 (D.C. Cir. Aug. 10, 1984).

On May 3, 1985, the United States Court of Appeals for the District of Columbia Circuit heard oral argument in the appeal. A decision is still pending. Should the Court of Appeals uphold Grumman's position that UMTA is required under the Disputes clause to provide *de novo* review of its dispute with the RTA, then the decision of the New York State courts also would be in conflict with the decision of the Court of Appeals for the District of Columbia Circuit, since, under such a decision, the *RTA litigation* would go to UMTA for arbitration but the New York litigation would stay in New York courts. This conflict would present an additional reason for granting this writ.

Thereafter, in accordance with New York CPLR 5513(b), Grumman filed a motion for leave to appeal to the New York Court of Appeals.The motion was filed pursuant to New York CPLR 5602(a)(1)(i) as an appeal from a final determination. Under New York law, an order which grants or denies a motion to compel arbitration constitutes a "final" determination for the purposes of a motion seeking permission to appeal to the Court of Appeals. The Court of Appeals denied Grumman's motion on July 9, 1985 (15a-17a). Like the Appellate Division, the Court of Appeals offered no opinion or explanation whatsoever.

REASONS FOR GRANTING THE WRIT

I.

THE NEW YORK STATE COURTS HAVE DECIDED A QUESTION OF FEDERAL ARBITRATION LAW IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

A. The New York State Courts Have Misconstrued Federal Arbitration Law.

This Court's review is required to secure for Grumman its right under the Federal Arbitration Act, 9 U.S.C. §§1 *et seq.*, to enforce the federally-mandated Disputes clause contained in all of its bus procurement contracts. Unless Grumman's petition for certiorari is granted, Grumman will be forced to engage in a protracted and costly litigation with the City in local state courts and before local juries within New York City, contrary to the agreement of the parties as set forth in the Disputes clause. It was precisely in order to avoid such a situation that UMTA mandated inclusion of a broad Disputes clause in the City contracts. Recently this Court expressly reaffirmed the strong federal policy in favor of the enforcement of arbitration agreements in *Dean Witter Reynolds, Inc.* v. *A. Lamar Byrd*, 53 U.S.L.W. 4222 (U.S. Mar. 4, 1985). The rulings below cannot be reconciled with this Court's decision in *Dean Witter* and numerous other arbitration cases presaging the same result.

The decision of the New York State court altogether disregards the strong federal policy in favor of arbitration and the uniform judicial repudiation of efforts to avoid contractual arbitration agreements by casting contract disputes in the form of tort claims. Although the New York Supreme Court's opinion recognizes that the Federal Arbitration Act is applicable since the contracts involve interstate commerce, the opinion completely disregards the settled principles of four leading decisions of this Court which have dealt with the enforcement of arbitration agreements. *Dean Witter, supra; Southland Corp.* v. *Keating,* 465 U.S. 1, 104 S.Ct. 852 (1984); *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.,* 460 U.S. 1 (1983); *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.,* 388 U.S. 395 (1967). The controlling federal arbitration law principles established by these cases require a liberal interpretation of the Disputes clause and a decision in favor of arbitration of the factual questions in dispute.

As this Court stated in *Southland Corp., supra,* for example, the policy behind this protected federal right to arbitrate is "to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges or . . . by state courts or legislatures." 104 S.Ct. at 859-60 (quoting Chief Judge Lumbard's concurring opinion in *Metro Industrial Painting Corp.* v. *Terminal Construction Co.,* 287 F.2d 382, 387 (2d Cir.), *cert. denied,* 368 U.S. 817 (1961)). Consequently, the Court reasoned that "[c]ontracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." 104 S.Ct. at 856.

The strong federal policy in favor of arbitration was forcefully reiterated by this Court in *Dean Witter, supra.* In a unanimous decision, this Court reaffirmed Congress' unambiguous intention under the Federal Arbitration Act to enforce private agreements to arbitrate, even in cases where the mix of arbitrable and non-

arbitrable issues in a litigation could result in bifurcated proceedings.

Dean Witter involved a litigation where both state law claims and federal securities claims were asserted with regard to a particular series of broker-dealer transactions. A motion to compel arbitration was made with regard to the state law claims under an agreement to arbitrate. Arbitration was opposed on the ground that, under federal securities law, the federal claims were not arbitrable and the state law claims were so intertwined with the federal claims as to preclude arbitration of those claims as well.

This Court rejected such an approach and mandated arbitration of the state law claims even at the risk of duplicative proceedings. The Court based its decision on Congress' clear and unambiguous intention to require enforcement of agreements to resolve disputes by extrajudicial means:

> [P]assage of the [Federal Arbitration] Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation. Indeed, this conclusion is compelled by the Court's recent holding in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1 (1983), in which we affirmed an order requiring enforcement of an arbitration agreement, even though the arbitration would result in bifurcated proceedings. That misfortune, we noted, "occurs because the relevant federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement," *id.*, at 20. See also *id.*, at 24-25 ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration")....
>
> The preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which parties had entered, and that concern requires that we vigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation, at least absent a countervailing policy manifested in another federal statute.

53 U.S.L.W. at 4224 (footnote omitted).

The decision in *Dean Witter* emphasizes in no uncertain terms the preeminent federal policy favoring, indeed mandating, enforcement of agreements to arbitrate. It also makes clear that trying to combine an arbitrable controversy with allegedly non-arbitrable issues, as the City has here attempted to do with its spurious "fraud" claims, can in no way militate against the enforcement of the agreement to arbitrate.[4]

B. UMTA's Unwillingness To Act As An Arbitrator Does Not Affect Grumman's Right To Arbitration.

The New York court based its decision in part upon UMTA's unwillingness to act as arbitrator (5a). As noted above, Grumman has challenged UMTA's position in connection with the *RTA litigation* and is awaiting a decision from the United States Court of Appeals for the District of Columbia as to whether UMTA must provide *de novo* review under the Disputes clause. *Grumman Ohio Corporation* v. *Dole, et al., appeal filed,* No. 84-5543 (D.C. Cir. Aug. 10, 1984). A decision in *Dole* favorable to Grumman would undercut the New York court's reliance upon UMTA's unwillingness to act as arbitrator and would present an additional reason for granting this writ.

Even if UMTA's refusal to grant *de novo* review is upheld in *Dole*, however, it would not lessen Grumman's right to arbitration under the Disputes clause. The proper remedy for the inability or refusal of a designated arbitrator to act is to appoint a substitute arbitrator, not to nullify the arbitration agreement itself.

4. It might be noted that *Utah Construction, supra,* so greatly relied upon by the New York Supreme Court, itself inveighed against the tactic, employed in this action by the City, of trying to avoid arbitration by casting arbitrable controversies under allegedly non-arbitrable rubrics. In response to a claim that certain issues were not within the ambit of the Disputes clause involved in *Utah Construction* because they involved breaches of contract rather than items subject to contractual remedies, this Court noted: "[a]ny claim, whether within or without the disputes clause, can be couched in breach of contract language. The contractual and statutory scheme would be too easily avoided if a party could compel relitigation of a matter once decided by a mere exercise of semantics." 384 U.S. at 419 (footnote omitted).

Astra Footwear Industry v. *Harwyn International, Inc.*, 442 F. Supp. 907 (S.D.N.Y.), *aff'd*, 578 F.2d 1366 (2d Cir. 1978); *Erving* v. *Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (2d Cir. 1972). Accordingly, while a decision in *Dole* favorable to Grumman would present this Court with an additional reason for granting this writ, even without such a decision the New York State courts have misapplied federal arbitration law.

II.

THE NEW YORK COURTS HAVE MISAPPLIED THIS COURT'S HOLDING IN *UTAH CONSTRUCTION* IN A MANNER WHICH ALSO CONFLICTS WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS IN *BETHLEHEM STEEL CORPORATION* v. *GRACE LINE, INC.*

Disregarding the vast body of authority favoring the enforcement of arbitration agreements, the New York Supreme Court based its decision almost entirely upon *Utah Construction*, which it viewed as "controlling" (5a). While the New York courts' reliance on *Utah Construction* as controlling authority is itself questionable, *see infra* Part III, nothing in *Utah Construction* justifies the New York courts' decision that the dispute in this case must be decided by a New York court and jury rather than under the administrative procedures set forth in the Disputes clause. Indeed, the manner in which the New York courts applied *Utah Construction* is in direct conflict with the decision of the United States Court of Appeals in *Bethlehem Steel Corporation* v. *Grace Line, Inc.*, 416 F.2d 1096 (D.C. Cir. 1969).

In *Bethlehem Steel* the Court of Appeals for the District of Columbia applied *Utah Construction* to a disputes clause contained in a contract in which Bethlehem Steel agreed to build ships for Grace Line. The disputes clause was similar to the clause contained in the contracts between Grumman and the

City. The disputes clause in *Bethlehem Steel* required the parties to submit disputes "arising under the contract" to the Maritime Administration, which subsidized the construction of the ships.

Grace Line sued Bethlehem Steel for breach of contract, contending that the ships were constructed with insufficient "banana reefer" (i.e. cargo) capacity. Bethlehem Steel invoked the disputes clause but the district court, viewing the controversy as not within the scope of the clause, refused to stay the proceedings pending submission of the dispute to the Maritime Administration.

The Court of Appeals reversed. Applying *Utah Construction* to determine whether the dispute was one "arising under the contract," the Court, analogizing to arbitration agreements and the doctrine of primary jurisdiction, held that the district court, in deciding whether the banana reefer dispute was within the scope of the disputes clause, should refer the matter to the Maritime Administration for a determination as to whether the claimed defect could be remedied under the contract's warranty provisions.

The New York courts' refusal in this litigation similarly to refer to UMTA the issue of whether the defects claimed by the City are remediable under the warranty provisions of the contracts is based upon a misapplication of *Utah Construction* and also conflicts with *Bethlehem Steel*. This error is further illustrated by the manner in which the identical issue was treated by the United States District Court for the Northern District of Illinois in the *RTA litigation*. The RTA brought suit against Grumman Ohio Corporation purporting to allege similar claims for breach of contract, fraud, and punitive damages as are asserted in the instant action. RTA's purported claims also arose in connection with the same bus procurement program and a contract that is identical in all material respects to the City contracts at issue in this litigation, and which included the identical UMTA-mandated Disputes clause provision contained in the UMTA-promulgated "White Book."

Based on the identical *Utah Construction* analysis which the New York courts purport to follow, District Judge Shadur, in the *RTA litigation*, granting the identical motion to dismiss which was rejected by the New York courts in this litigation, has come to the diametrically opposite conclusion: that the *Utah Construction* case requires submission of this type of dispute to the administrative process set forth in the Disputes clause. Unlike the state courts in this action, the federal court in the *RTA litigation* was not misled by counsel's artful efforts to disguise the contractual issues in dispute as torts. The focus of the federal court was on the core facts at issue, the specifics of the contractual undertakings, and the language of the Disputes clause; it was not on the complaint's legal theories or rhetoric.

District Judge Shadur looked to the contract's extensive warranty provisions and concluded that the contract "demonstrates that the parties *anticipated* the need to repair defective buses and specifically provided for such a situation in the Agreement. In *Utah Construction* terms, RTA's claim appears 'redressable under specific contract adjustment provisions.' Thus, the disputes clause requires that RTA first exhaust its administrative remedy." 532 F. Supp. at 666. Judge Shadur also relied upon *Bethlehem Steel* and did exactly what was ordered in that case: he required that the disputes be addressed in the first instance at the administrative level.

The federal rulings make it absolutely clear that under the exact same UMTA-mandated contract as is involved in this case, the factual issues in dispute in Chicago are subject to the Disputes clause procedures and should not be decided by courts and juries. Although the federal court has held in Grumman's favor in the *RTA litigation*, the opposite result has been reached in the New York State courts. Review by this Court, therefore, is necessary to provide a uniform federal rule and to assure Grumman that its rights under federal law are not violated in State court proceedings. Whether a case will be tried by jury or by arbitration should not "depend on the courthouse where suit is brought." *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203-04 (1956).

III.

THIS COURT SHOULD DECIDE WHETHER *UTAH CONSTRUCTION* HAS ANY APPLICATION TO ARBITRATION AGREEMENTS BETWEEN PRIVATE PARTIES.

As indicated above, the New York courts, relying almost exclusively upon *Utah Construction,* ignore relevant decisions of this Court dealing directly with the enforcement of arbitration agreements in contracts between non-federal parties. While Grumman believes that if *Utah Construction* is applicable, a proper analysis thereunder leads to results similar to those reached by Judge Shadur in the *RTA litigation,* whether *Utah Construction* even applies to the interpretation of a disputes clause contained in a contract between private (non-federal) parties is a matter of first impression in this Court. Given the strong public policy favoring the liberal application of arbitration remedies provided for in arbitration agreements, *see supra,* Part I, this Court should decide whether *Utah Construction* limits a private litigant's rights under the Federal Arbitration Act.

Utah Construction dealt with a specialized area of contract law—namely, federal procurement law, where the federal government was a party and the issue was whether the dispute was within the jurisdiction of a specialized board of contract appeals or the United States Court of Claims. It cannot under any circumstances, therefore, be considered the basis for denying arbitration of a dispute between private parties where the result of denying arbitration is to force the parties to litigate their disputes before non-specialized courts and local juries.

The more relevant authorities in this situation are *Dean Witter, Southland Corp., Moses H. Cone, Prima Paint Corp.* and the other cases cited above, which specifically deal with arbitration agreements between private parties and which require that all doubts be resolved in favor of arbitration.

The issues involved in this petition primarily concern the operation of substantive federal arbitration law and an interpretation of a Disputes clause contained in a contract to which the federal government is not a party. The New York courts acknowledged

the federal questions involved yet ignored or misconstrued the most relevant federal authorities which address these issues.

The federal questions involved in this proceeding are important. Aside from numerous other federal grant programs raising similar issues, UMTA itself has mandated inclusion of the identical Disputes clause in hundreds of UMTA-funded contracts between manufacturers and local transit authorities nationwide. Given the conflicting results in the *RTA litigation* and this proceeding, all parties to such contracts should be given the benefit of this Court's exposition on the federal questions involved.

Review by this Court also would be in the public interest. As has been demonstrated, public policy, as reflected in federal law, strongly favors the liberal application of arbitration remedies provided for in arbitration agreements. *See, e.g., Dean Witter, supra; Southland Corp., supra; Moses H. Cone, supra;* and *Prima Paint Corp., supra.* The decision of the New York State courts clearly runs counter to this strong public policy and foreshadows similar results in other lawsuits brought in state courts by local procurement agencies.

Finally, a determination by this Court in Grumman's favor will obviate the need for lengthy and costly litigation and provide for the resolution of the disputes at issue in this action and the RTA action by an expert body applying uniform standards and procedures on a national basis in accordance with UMTA's regulations.

In short, only review by this Court provides a means for Grumman to avoid a deprivation by the state courts of its federally-mandated and contractually-stipulated arbitration rights.

CONCLUSION

For the foregoing reasons, the requested Writ of Certiorari should issue.

Dated: October 7, 1985

Respectfully submitted,

/s/ MILTON EISENBERG, P.C.

MILTON EISENBERG, P.C.
(Counsel of Record)
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Attorneys for Petitioners

APPENDIX

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
Index No. 11281/84

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY AND PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Plaintiffs,

-against-

GRUMMAN OHIO CORPORATION, GRUMMAN ALLIED INDUSTRIES, INC. AND GRUMMAN CORPORATION,

Defendants.

NOTICE OF ENTRY

SIRS:

PLEASE TAKE NOTICE that the within is a true copy of an order and decision duly made and entered in the Supreme Court of the State of New York, County of New York, on September 19, 1984.

Dated: New York, New York
September 19, 1984

Yours, etc.,

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WHARTON & GARRISON
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SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM: PART I
Index No. 11281/84

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY AND PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Plaintiffs,

-against-

GRUMMAN OHIO CORPORATION, GRUMMAN ALLIED INDUSTRIES, INC. AND GRUMMAN CORPORATION,

Defendants.

McCOOE, J.:

Defendants' motion to dismiss the complaint (CPLR 3211) is converted to a motion to compel arbitration (CPLR 7503 A). The issue is whether the subject of the action comes within the scope or coverage of the "Disputes" clause in Part I of three four-part contracts entered into between the plaintiffs and defendant Grumman Ohio (Flxible). The Court finds that is does not and denies the motion.

The complaint alleges causes of action for intentional and negligent misrepresentation (Counts I and III), breach of contract (Count II) and breach of implied warranties (Counts IV and V), arising from the sale to plaintiffs by defendant Flxible of 1013 Model 870 advanced transit buses pursuant to written contracts containing the "Disputes" clauses. The plaintiffs seek compensatory and punitive damages. The contracts were prepared by the Urban Mass Transportation Administration (UMTA), a Federal agency, which provided 80% of the funding for the buses.

Plaintiffs allege that gross mechanical and structural defects, particularly in the under carriages, fraudulently concealed, necessitated removal of the majority of the buses from service in the interest of public safety and provides the gravamen of the complaint. The defendants deny these allegations and contest the claimed necessity for removal of the buses from service.

The interpretation of the contracts, based primarily on the intent of the contracting parties, is determined by federal substantive law since the transaction involves interstate commerce. (USC Title 9 Sec. I; Matter of Black & Pola, 72 A.D. 2d 514, aff'd 50 N.Y.2d 821; Matter of Rederi (Dow Chemical Co.), 25 N.Y.2d 576; Matter of Cone v. Mills, 90 A.D.2d 31. As the Court stated in Matter of Cone v. Mills, supra, at page 33:

> Thus a New York court, applying the Federal Arbitration Act, limits its inquiry to whether there is a valid agreement to arbitrate the particular dispute. All other questions . . . are for the arbitrator.

The "Disputes" clause states:

> Except as otherwise provided in this contract, any dispute concerning a question of fact *arising under this contract* which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to UMTA a written appeal. The decision of UMTA's duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.
>
> This clause does not preclude consideration of law questions in connection with decisions provided for in this

clause, provided that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law. (Emphasis supplied).

The procedure under the Disputes clause would require the initial hearing to be held before a representative of the plaintiffs (Contracting Officer) with a right of appeal to UMTA. UMTA's undisputed policy is that (a) "the Disputes Clause was intended to allow UMTA to decide, on a *de novo* basis, only those issues directly related to the interpretation and effectiveness of the White Book Specification. It was never intended to apply to issues relating to performance or damages arising out of post-delivery problems." (Letter dated March 30, 1983 from UMTA Administrator to Grumman Flxible Corp.), and (b) that UMTA has no administrative machinery to handle a de novo hearing on the issues raised but only determine the appeal on a "reasonableness" test.

The controlling authority is United States v. Utah Const. Co., 384 U.S. 394 which, in interpreting a similar disputes clause, enunciated two principles determinative of the intstant case:

1. The intention of the contracting parties is controlling (Id at 407).
2. The words "arising under this contract" have a restrictive meaning (Id at 407, 413, 417) with the scope of administrative review not "extended to breach of contract claims not redressable under other clauses of the contract" (Id at 404). Administrative review is limited to situations "when the contract makes provision for equitable adjustment of particular claims, such claims may be regarded as converted from breach of contract claims to claims for relief under the contract." Id at 404 n. 6.

Each contract is divided into four parts: Part I entitled "Solicitation, Offer and Award Contractual Provisions" contains numerous provisions relating to pre-delivery issues such as delays in delivery and extensions to be decided by the "Contracting Officer". See Secs. 2.4.1, 2.4.2, 2.8, 2.81, 2.82. The disputes

clause appears after these paragraphs and at the end of Part I. Plaintiffs claim a breach of contract action and breaches of implied warranties outside the contract based on statutory violations (U.C.C.). Finally they allege fraud claims seeking punitive damages which clearly are outside the contract. Part IV is entitled "Warranty Provisions" and states "Warranties in this document are in addition to any other statutory remedies or warranties imposed on the Contractor".

The distinction between the types of claims to be administratively determined and those judicially determined can be appreciated after a quotation from U.S. v. Utah, supra. The Court adopted the reasoning of the Court of Claims that "had established the jurisdiction of the Boards of Contract Appeals under the disputes clause was limited to claims for equitable adjustments, time extensions, or other remedies under specific contract provisions authorizing such relief and accordingly that the contractor need not process pure breach of contract claims through the disputes machinery before filing his court action." Id at 405. The action should be judicially determined unless all issues can be completely resolved administratively. Bethlehem Steel Corp. v. Grace Line Inc., 416 F.2d 1096, 1101.

Adopting the defendants' position would mean submitting complex factual and legal issues relating to violations of the U.C.C, fraud and punitive damages to a contracting officer. The ultimate question is whether the parties intended this type of controversy to be submitted to a "Contracting Officer". The answer is clearly No. The subject matter and the claims advanced, which are not shown to be frivolous, necessarily require each case to be sui generis and reliance by defendant on lower court cases with different claims, is not determinative.

The motion is denied for the foregoing reasons.

This Decision constitutes the Order of the Court.

Dated: September 18, 1984.

/s/ WILLIAM P. MCCOOE

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT
New York County Clerk's Index No. 11281/84

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY AND PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Plaintiffs-Respondents,

-against-

GRUMMAN OHIO CORPORATION, GRUMMAN ALLIED INDUSTRIES, INC. AND GRUMMAN CORPORATION,

Defendants-Appellants.

NOTICE OF ENTRY

SIRS:

PLEASE TAKE NOTICE that annexed is a true and accurate copy of an order duly entered in the above-captioned action and filed with the Clerk of the Appellate Division of the Supreme Court of the State of New York, First Department on February 19, 1985.

Dated: New York, New York
February 19, 1985

Yours, etc.,

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Attorneys for Defendants-Appellants

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 19, 1985.

Present-Hon. JOSEPH P. SULLIVAN, JUSTICE PRESIDING,
JOHN CARRO,
SIDNEY H. ASCH,
ARNOLD L. FEIN, JUSTICES.

22309N

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY AND PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Plaintiffs-Respondents,

-against-

GRUMMAN OHIO CORPORATION, GRUMMAN ALLIED INDUSTRIES, INC. AND GRUMMAN CORPORATION,

Defendants-Appellants.

An appeal having been taken to this Court by the defendants-appellants from the order of the Supreme Court, New York County (William McCooe, J.), entered on or about September 20, 1984, which converted defendants' motion to dismiss the complaint or to stay the proceedings to a motion to compel arbitration and denied such motion, and said appeal having been argued by Milton Eisenberg, of counsel for the appellants, and by Leslie Gordon Fagen, of counsel for the respondents; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

/s/ HAROLD J. REYNOLDS

Clerk.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT
NEW YORK COUNTY CLERKS'S INDEX NO. 11281/84

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and PORT AUTHORITY OF NEW YORK AND NEW JERSEY

Plaintiffs-Respondents,

-against-

GRUMMAN OHIO CORPORATION, GRUMMAN ALLIED INDUSTRIES, INC. and GRUMMAN CORPORATION

Defendants-Appellants.

NOTICE OF ENTRY

SIRS:

PLEASE TAKE NOTICE that annexed is a true and accurate copy of an order duly entered in the above-captioned action and filed with the Clerk of the Appellate Division of the Supreme Court of the State of New York, First Department on April 23, 1985.

Dated: New York, New York
April 23, 1985

Yours, etc.,

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Attorneys for Defendants-Appellants

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 23, 1985

Present—Hon. JOSEPH P. SULLIVAN, Justice Presiding
JOHN CARRO
SIDNEY H. ASCH
ARNOLD L. FEIN, Justices

M-1444
[22209N]

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY AND PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Plaintiffs-Respondents,

-against-

GRUMMAN OHIO CORPORATION, GRUMMAN ALLIED INDUSTRIES, INC. AND GRUMMAN CORPORATION,

Defendants-Appellants.

The above-named defendants-appellants having moved for leave to appeal to the Court of Appeals from the order of this Court entered on February 19, 1985,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion, and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied with $20 cost.

ENTER:

/S/ HAROLD J. REYNOLDS
Clerk.

COURT OF APPEALS OF THE STATE OF NEW YORK
Index No. 11281/84

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Plaintiffs,

-against-

GRUMMAN OHIO CORPORATION, GRUMMAN ALLIED INDUSTRIES, INC. and GRUMMAN CORPORATION,

Defendants.

NOTICE OF ENTRY

SIRS:

PLEASE TAKE NOTICE that the annexed is a true and accurate copy of an order entered by the Court of Appeals of the State of New York on July 9, 1985.

Dated: New York, New York
July 18, 1984

Yours, etc.,

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Attorneys for Defendants

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the ninth day of July A.D. 1985

Present,

HON. SOL WACHTLER, *Chief Judge, presiding.*

1 Mo. No. 615

THE CITY OF NEW YORK,
NEW YORK CITY TRANSIT AUTHORITY, ET AL.,

Respondents,

vs.

GRUMMAN OHIO CORPORATION,
GRUMMAN ALLIED INDUSTRIES, INC.,
AND GRUMMAN CORPORATION,

Appellants.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

/S/ KATHRYN C. BROWN

KATHRYN C. BROWN
DEPUTY CLERK OF THE
COURT